

**Four Winds Services, Inc. and International Brotherhood of Electrical Workers, Local Union 1141, AFL-CIO.** Case 17-CA-18977

April 10, 1998

**DECISION AND ORDER**

BY MEMBERS FOX, LIEBMAN, AND BRAME

On December 2, 1997, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified.<sup>3</sup>

We agree with the judge that the Respondent did not carry its burden of showing that the historical electricians unit is no longer appropriate simply because the wages and benefits of some unit members are governed by the Davis-Bacon Act and others are not. Such differences in compensation rates do not destroy a community of interest among employees and would not require that they be in separate units. *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994), enf. 84 F.3d 637 (2d Cir. 1996). See also *Borden, Inc.*, 308 NLRB 113, 115 (1992), enf. 19 F.3d 502 (10th Cir. 1994), cert. denied 513 U.S. 927 (1994) (noting the widespread existence of dual-tier pay structures for employees doing the same work in the same unit).

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Four Winds Services, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

<sup>1</sup>The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

<sup>2</sup>In finding that the Board has jurisdiction over the Respondent, the judge inadvertently failed to state the following facts which were admitted by the Respondent in its answer to the complaint. The Respondent, a corporation with an office in Oklahoma City, Oklahoma, provides maintenance services to Federal Government agencies, including the Federal Aviation Administration (FAA). Its 1997 contract with the FAA to perform maintenance and repair services at the Mike Monroney Aeronautical Center is valued in excess of \$50,000 per year.

<sup>3</sup>We shall modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its Oklahoma City, Oklahoma office, at the FAA's Mike Monroney Aeronautical Center, copies of the attached notice marked 'Appendix.'<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 1997, the date of the unfair labor practice."

*Rufus L. Warr, Esq.*, for the General Counsel.

*Charles W. Ellis, Esq. (Lawrence & Ellis)*, of Oklahoma City, Oklahoma, for the Respondent.

*Bill J. Motley*, Business Manager (IBEW Local 1141), of Oklahoma City, Oklahoma, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

RICHARD J. LINTON, Administrative Law Judge. This is a successorship case. Resolution turns on whether the certified bargaining unit recognized by the predecessor, FKW, Inc., has been shown to be no longer appropriate when Respondent Four Winds Services, Inc. (Four Winds), as the successful bidder for the work involved, took over the work effective January 1, 1997. Finding the answer to be no, and that the unit therefore was appropriate at all times, I find that Four Winds, as FKW's successor, violated Section 8(a)(5) of the Act by refusing, on January 2, 1997, to recognize and bargain with the Union. I order Four Winds to recognize and bargain with the Union.

I presided at this 2-day trial, March 17-18, 1997, in Oklahoma City, Oklahoma. Trial was pursuant to the February 25, 1997 order consolidating cases, consolidated complaint, and notice of hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 17 of the Board.

The complaint is based on charges which the Union (IBEW Local 1141) had filed against FKW (Cases 17-CA-18563 and 17-CA-18969) (filed from February 9, 1996, to January 9, 1997) and against Four Winds (Case 17-CA-18977) (filed and served January 16, 1997). On March 17, 1997, shortly before I opened the record in this proceeding, and based on an indicated settlement, the Acting Regional

Director severed the two FKW cases by his order (GCX 5) dated March 17, 1997.<sup>1</sup>

The pleadings establish that the Board has both statutory and discretionary jurisdiction over Four Winds, that Four Winds is a statutory employer, and that IBEW Local 1141 is a statutory labor organization. They further establish that, by letter dated December 31, 1996 (GCX 3), the Union requested that Four Winds recognize and bargain with it as the exclusive bargaining representative of employees in the bargaining unit (a unit of electricians). By letter dated January 2, 1997 (GCX 4), Four Winds denied the Union's request on the basis of doubt that the Union represented a majority of employees in any appropriate unit.

In the Government's complaint, the General Counsel alleges that, since January 2, 1997, Four Winds has violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union as the collective-bargaining representative of the employees in the bargaining unit. The complaint actually alleges both a violation of Section 8(a)(1) and (5) based on the refusal to recognize and bargain. Admitting the fact, but denying any violation, Four Winds avers that its refusal was legally justified. As no independent 8(a)(1) conduct is alleged, the 8(a)(1) alleged is merely derivative of the 8(a)(5), as in 8(a)(5) and (1). *Flannery Motors*, 321 NLRB 931 at 931 (1996).

The situs involved here is the Will Rogers World Airport at Oklahoma City, Oklahoma, and, specifically, the FAA's Mike Monroney Aeronautical Center (the Center) located on the west side (2:105) of the airport's property.

For witnesses the General Counsel called Bill J. Motley, the Union's business manager; Kirk Thrasher, a lead electrician employed by Four Winds, and Stanley W. Houser, another electrician employed by Four Winds. The General Counsel then rested. (1:80.) Four Winds recalled Motley, briefly, and then called Travis Brown, Four Winds' project manager at the Center, and Denis M. Carson, Four Winds' general manager. Four Winds then rested. (2:173.) For a brief rebuttal, the General Counsel recalled Business Manager Motley. There was no surrebuttal.

No material facts (as to incidents, conversations, or the like) are disputed. Portions of the testimony relate to asserted provisions, interpretations, or applications of the Davis-Bacon Act and the Service Contract Act, and there is some dispute about such matters. Much of such testimony is in the form of tertiary authority (attended seminars; worked as a contracting officer or union representative) concerning such laws, and regulations, interpretations, and procedures by the Wage-Hour Division of the U.S. Department of Labor. (No party saw fit to call, as an expert witness, someone from the Wage-Hour Division to testify.) I attach little weight to whatever is contested on such legal matters. Although the parties lodged no objections to the competency of the witnesses to expound on these subjects, that does not bind the Board to give weight to such expoundings.

On the entire record, including my observation of the demeanor of the witnesses,<sup>2</sup> and after consideration of the

briefs filed by the General Counsel and Four Winds, I make these:

#### FINDINGS OF FACT

##### A. Background

The parties stipulated (1:9–10) that, from 1986 to December 31, 1996, FKW had a contract with the FAA to provide facility maintenance at the Center (Mike Monroney Aeronautical Center) in Oklahoma City. The Center, situated on 900 acres on the west side of the airport, consists of 16 major buildings and 26 smaller buildings containing some 4 million square feet of usable office space. (2:105, Brown.) The FAA's mission there is to train air traffic controllers and aviation accident investigators. Records of all pilots are maintained and stored there. (2:105–106.) The Center's buildings are used mainly as training facilities for air traffic controllers. (2:105.) The airplanes and airport terminal, of course, are not included. (1:74–75, Thrasher.) Nearly all the maintenance work applies to the interior of the buildings. The city of Oklahoma City maintains the buildings' exterior. (2:123, Brown.) In 1990 the Union filed a petition, docketed as Case 17–RC–10512, to represent FKW's electricians. An election was held on June 27, 1990, and on July 5, 1990, the Acting Regional Director issued a Certification of Representative (GCX 2) certifying the Union as the exclusive collective-bargaining representative of FKW's employees in the following appropriate unit:

All full time and regular part-time master electricians, industrial electricians and electrician helpers employed by the Employer at the Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma, But EXCLUDING all other employees including Q.A. specialists, master industrial HVAC, journeymen HVAC, helper HVAC, boiler mechanics/pipefitters, mill wrights and helpers, journeymen carpenters, master plumbers and helpers, painters and helpers, elevator mechanics and helpers, fire suppression technicians, pest control technicians, laborers, maintenance trade helpers, water treatment specialists, electronics technicians, CCMS team leader, CCMS operators, CCMS surveillance employees, warehouse team leader, computer programmer/analyst, computer hardware technician, O&M electromechanical technicians, equipment mechanics, preventive maintenance employees, telecommunications manager, office clerical employees, guards and supervisors, as defined in the Act.

Bargaining commenced, and some 40 to 50 meetings were held, but no contract was ever concluded. (1:39, 52.) In 1992 a 1-day trial was conducted on a complaint alleging a refusal to bargain. Initially the complaint was dismissed. *FKW*, 314 NLRB 289 (1994). When the District of Columbia Circuit Court of Appeals vacated the Board's order, the Board, on remand, found a violation. *FKW*, 321 NLRB 93 (1996). While the litigation was pending, the parties agreed to suspend negotiations. (1:51–52, Motley.)

At a meeting about October 1996, after negotiations had resumed, FKW's attorney and Travis Brown, FKW's contract negotiators, informed the Union's Bill Motley that FKW was no longer eligible to bid on the upcoming maintenance con-

<sup>1</sup> References to the two-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's and RX for Respondent Four Winds.

<sup>2</sup> As I have suggested, demeanor is not an issue. All witnesses testified with apparent sincerity.

tract, and that another contractor would take over. (1:47.) Eventually, in December, Motley learned from Denis Carson that Four Winds (the new contractor) would be represented by (FKW's) Attorney Charles W. Ellis. (1:48.) Carson confirmed that employment applications for Four Winds had been distributed at FKW. (1:48-49.) On December 6, 1996, Carson testified (2:160), Four Winds was awarded the maintenance contract.

Lead electrician Kirk Thrasher testified that, at a general meeting of all FKW employees (an "all hands" meeting) in December 1996, Travis Brown told assembled employees that Four Winds had been awarded the contract, and that FKW and JWK (another contractor) would be subcontractors, with FKW handling the automated warehouse, JWK handling the preventive maintenance (PM) program, and everyone else working for Four Winds. (1:56-57.) Around that time, apparently, FKW supervisors, as Thrasher recalls, distributed applications for employment with Four Winds. (1:58, 70.) Effective January 1, 1997, Four Winds became the new maintenance contractor. (1:58; 2:132.)

### B. Operation of the Maintenance Contract

#### 1. General

Under the contract, FAA permits an employee complement of 87 full-time employees plus some temporaries. The total employee complement is around 100. They belong to various crafts, including HVAC (heating, ventilation, and air conditioning), carpenters, plumbers, elevator mechanics, and others, plus the electricians. (2:133; RX 6.) As an organization chart in evidence (RX 6) shows, Four Winds employs about half the full-time employees, with the 2 subcontractors (FKW and JWK) employing the other half, and Four Winds employing some 2 dozen temporary employees, for a total of slightly over 100.

Travis Brown, Four Winds' project manager for the contract at the Center, had held that same position with FKW for 7 or 8 years. (2:104-105, 156-157.) Most all the managers and supervisors under him also came over from FKW, and usually to the same position that they occupied at FKW. In late December 1996, the bargaining unit involved here consisted of all the electricians (about 15) employed by FKW. The electricians, and all the other crafts, were assigned to functional departments. Of the 15 electricians, 8 were in Building Support and 4 were in Environmental Services. These 12 were hired by Four Winds effective January 1, 1997. (1:58-59, 79.) Two electricians were on the pm crew, and on January 1 they went to JWK, the subcontractor. (1:79, Houser.) The 15th electrician worked in the automated warehouse and telecommunications department, and he remained with FKW. (1:79-80.) Four Winds hired four additional electricians (who were not at FKW) in Building Support since January 1. (1:59-61, Thrasher.) However, these may have been temporaries, for the chart (RX 6), as confirmed by Brown (2:110-111), lists only six full-time electricians. Thrasher's current number of 12 to 13 (1:71) adds up, however, when the 7 temporaries listed (RX 6) are added to the number of full-time electricians in Building Support.

Under both FKW and Four Winds, the functions of the Building Support department and Environmental department (Four Winds denominates it the Environmental Branch, RX 6) remain the same, as does the work of the electricians. As

Thrasher testified (1:58, 61, 73), "Our work has not changed." Building Support is concerned with remodeling of the interior of the buildings. For example, if the Center wants walls moved to reconfigure offices, the electricians will be only one of several crafts involved in that project. Thus, work of these crafts is coordinated and planned in advance. (1:65-67, Thrasher; 2:118-119, 122, Brown.) By contrast, the separately supervised Environmental electricians perform, as they did with FKW, the "trouble shooting." (1:65, 69, 71; 2:119-120.) "Trouble calls," as the term implies, are about problems—such as flickering lights (1:69, 78), odors of electrical wires burning (1:78), or problems with noisy lights, light switches, nonfunctioning sound systems, video screens, or computer systems (2:119-120). As such description suggests, the Environmental electricians work alone rather than in conjunction with carpenters or members of the other crafts. (2:122.) Similarly, the two groups of electricians do not work together. (2:122, Brown.)

#### 2. After Davis-Bacon imposed

The source of the problem in this case dates to January 1, 1996. Before that date, all FKW's personnel at the Center were covered by the Service Contract Act. (2:147, Brown.) About early to mid-December 1995, the FAA contracting office informed Project Manager Brown that, beginning January 1, 1996, FKW would have to pay the Davis-Bacon prevailing wage rates to the crafts (including the electricians) in the Building Support group. (2:110-111, 135, 147-149.) FKW had no choice but to comply. (2:147-148.) At a subsequent bargaining session about July 1996, the Union submitted copies of a maintenance agreement (RX 4) and a construction agreement (RX 5), between another employer and a different IBEW local, suggesting that they could serve as models for similar agreements for FKW's two groups of electricians. (2:136-137, 154.) No information is given about any bargaining on the subject, and nothing suggests that the Union insisted on that suggestion.

The sticking point here appears to be certain differences which apparently exist in the wage and benefit schemes under the Davis-Bacon Act and the Service Contract Act. Wage determinations by the Wage-Hour Division have issued under both Acts as to the Building Support group (Davis-Bacon) and as to the Environmental group (Service Contract), and they have been made a part of Four Winds' contract with the FAA. (2:155, Brown.) Brown acknowledges, however, that room for some bargaining between the Union and Four Winds can take place respecting both groups. (2:156.)

### C. Discussion

As one of the cases cited (Br. 13) by Four Winds instructs, the "Davis-Bacon rates are a minimum rate, and higher wage and benefit packages may be, and often are, negotiated by the contractors and union employees." *Operating Engineers Local 571 v. Hawkins Construction Co.*, 727 F.Supp. 537, 539 (D.Ct. Neb. 1990). And the Service Contract Act initially looks to any collective-bargaining agreement. *Gracey v. Electrical Workers IBEW Local 1340*, 868 F.2d 671 (4th Cir. 1989).

In short, while some areas of bargaining are restricted, others are open. Nothing in the record, or the law, would call

for a finding that the historical bargaining unit of electricians is inappropriate simply because part of the unit (the majority, even) is covered by the Davis-Bacon Act, while the remainder is covered by the Service Contract Act. The unit as a whole is covered by the National Labor Relations Act, and that statute is flexible enough to accommodate other federal laws. Thus, parties can still meet the requirements of the Davis-Bacon Act and the Service Contract Act and still reach a collective-bargaining agreement under the National Labor Relations Act.

In any event, and contrary to the implication in Four Winds' brief (Br. 8), the "heavy evidentiary burden" is on Four Winds to prove that the historical unit is no longer appropriate, and not on the Government to prove that it remains appropriate. *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994), *enfd.* 84 F.3d 637 (2d Cir. 1996). Four Winds has not carried that burden here. As Four Winds was the successor to FKW, and as the historical bargaining unit at all times has remained an appropriate bargaining unit, it follows that, by its refusal of January 2, 1997, to recognize and bargain with the Union respecting the bargaining unit, Four Winds violated Section 8(a)(5) of the Act, as alleged.

#### CONCLUSIONS OF LAW

1. As of January 1, 1997, Four Winds Services, Inc. became the successor employer to FKW, Inc. respecting the employees in the following appropriate bargaining unit:

All full time and regular part-time master electricians, industrial electricians and electrician helpers employed by the Employer at the Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma, But EXCLUDING all other employees including Q.A. specialists, master industrial HVAC, journeymen HVAC, helper HVAC, boiler mechanics/pipefitters, mill wrights and helpers, journeymen carpenters, master plumbers and helpers, painters and helpers, elevator mechanics and helpers, fire suppression technicians, pest control technicians, laborers, maintenance trade helpers, water treatment specialists, electronics technicians, CCMS team leader, CCMS operators, CCMS surveillance employees, warehouse team leader, computer programmer/analyst, computer hardware technician, O&M electromechanical technicians, equipment mechanics, preventive maintenance employees, telecommunications manager, office clerical employees, guards and supervisors, as defined in the Act.

2. At all times material here, the Union has been and is the exclusive collective-bargaining representative of the employees in the bargaining unit.

3. By refusing, since January 2, 1997, to recognize and bargain with the Union respecting the bargaining unit, Four Winds has violated Section 8(a)(5) and (1) of the Act.

4. The unfair labor practice found affects commerce with the meaning of Section 2(6) and (7) of the Act and, unless permanently enjoined, will continue to do so.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, Four Winds Services, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Electrical Workers, Local Union 1141, AFL-CIO as the exclusive bargaining representative of the employees in the appropriate unit described below.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

(b) Within 14 days after service by the Region, post at its Oklahoma City, Oklahoma office, at the FAA's Mike Monroney Aeronautical Center, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 16, 1997, the date the charge herein was filed and served.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with Electricial Workers IBEW Local 1141 as the exclusive bargaining representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full time and regular part-time master electricians, industrial electricians and electrician helpers employed by the Employer at the Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma, But EXCLUDING all other employees including Q.A. specialists, master industrial HVAC, journeymen HVAC, helper HVAC, boiler mechanics/pipefitters, mill wrights and helpers, journeymen carpenters, master plumbers and helpers, painters and helpers, elevator mechanics and helpers, fire suppression technicians, pest control technicians, laborers, maintenance trade helpers, water treatment specialists, electronics technicians, CCMS team leader, CCMS operators, CCMS surveillance employees, warehouse team leader, computer programmer/analyst, computer hardware technician, O&M electromechanical technicians, equipment mechanics, preventive maintenance employees, telecommunications manager, office clerical employees, guards, and supervisors, as defined in the Act.

FOUR WINDS SERVICES, INC.